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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

v.

KEITH M. SCOTT,
Respondent

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

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62 pp

QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to parole revocation proceedings?

2. Whether a parolee has a reasonable expectation of privacy, entitled to Fourth Amendment protection, when he consents to a search of his residence as a condition of accepting parole?

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Petitioner is the Pennsylvania Board of Probation and Parole, an agency of the government of the Commonwealth of Pennsylvania. Respondent is Keith M. Scott.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 698 A.2d 32 (1997) and is reprinted in the Appendix at 1a. The opinion and order of the Commonwealth Court of Pennsylvania are reported at 668 A.2d 590 (1995),[1] and are reprinted in the Appendix at 19a.

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[1]Between the time that the Commonwealth Court panel issued its decision (November 30, 1995) and the time that the Supreme Court of Pennsylvania issued its decision in this case (July 3, 1997), the Commonwealth Court issued a decision *en banc* which overruled its decision in this case and held that the exclusionary rule does not apply to parole revocation proceedings. Pet. App. 6a. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n.8 (Pa. Cmwlth Ct. 1996) (en banc).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was filed on July 3, 1997, and this petition for writ of certiorari has been filed within ninety days of that date. The Court has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *U.S. Const. Amend. IV.*

STATEMENT OF THE CASE

The issue in this case is whether the exclusionary rule should apply to bar evidence of parole violations in the context of a state parole board's decision whether to revoke the parole of a convicted offender. The Supreme Court of Pennsylvania has held that, despite the administrative nature of parole revocation proceedings and despite the parolee's execution of a written consent to search his residence at any time, where a parole agent "has reason to be aware" of the parolee's status, he or she "must have reasonable suspicion of a parole violation" in order to conduct a search and, furthermore, if the administrative record does not adequately support reasonable suspicion, the exlcusionary rule will apply in the parole revocation hearing to bar evidence supporting violations of conditions of parole. Pet. App. 16a-17a. This decision is in conflict with decisions from other jurisdictions, both state and federal, and presents a significant issue that has not been addressed by the Court. The Court should therefore take this opportunity to resolve the issue which is important to the functioning of state parole boards across the country.

1. On September 1, 1993, respondent Scott was paroled by the Pennsylvania Board of Probation and Parole ("Board") from a 10-20 year term of imprisonment for conviction of third degree murder. Pet. App. 1a, 19a. As a condition of accepting parole, Scott signed an agreement expressly consenting to the search of his person, property or residence by Board agents without a warrant. Pet. App. 2a, 30a n.3. On February 4, 1994, the Board issued a warrant to detain Scott, together with a notice charging him with violations of the terms and conditions of his parole. Pet. App. 19a-20a. Among the conditions alleged by the Board to have been violated was the prohibition against the ownership or possession of any firearms or other weapons. Pet.

App. 20a. This violation was supported by three counts, one of which charged that on February 4, 1994, several weapons — including three shotguns, a semi-automatic rifle, and a bow and arrows — were found in Scott's residence by parole agents. Pet. App. 20a.

At the parole revocation hearing, Scott argued that the parole agents' search of his residence violated his Fourth Amendment right to be free from unreasonable searches and seizures. Pet. App. 3a-4a. The hearing examiner overruled Scott's objection to introduction of the evidence obtained from the parole agents' search. The testimony revealed that parole agents had obtained a key to his residence from Scott, entered the residence in the presence of a friend of Scott's, asked the friend to telephone Scott's mother (who owned the residence) and, after the mother's arrival, searched Scott's bedroom and common areas. Pet. App. 2a-3a. The search revealed the shotguns, rifle, and bow and arrows in a room next to Scott's bedroom on the second floor of the house. Pet. App. 3a. The Board relied in part on the evidence obtained from the search when it revoked Scott's parole. Pet. App. 5a.

2. On appeal to the Commonwealth Court of Pennsylvania,[2] Scott raised a number of issues including the argument of a Fourth Amendment violation. A panel of the Commonwealth Court concluded that, although parole revocation proceedings are administrative functions and not criminal prosecutions, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of

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[2]The Commonwealth Court is the intermediate appellate court in Pennsylvania vested with jurisdiction to hear appeals from state administrative agencies, including the Board of Probation and Parole. *See* 42 Pa. Cons. Stat. §763 .

consent of the owner or what it termed a "statutory or regulatory framework that satisfies the reasonableness requirement of the Fourth Amendment." Pet. App. 29a. Declaring that Scott's previously-executed written consent to a search of his residence and consent to seizure of items found by parole agents did not comport with the Fourth Amendment, the Commonwealth Court decided that Scott's Fourth Amendment rights had been violated. Pet. App. 30a-31a. The court went on to hold that the exclusionary rule should apply to parole revocation hearings, Pet. App. 37a, and that it was "necessary" to apply it to the weapons seized from Scott's residence. Pet. App. 37a. As a result, the court decided that the hearing examiner should have excluded evidence concerning the weapons, and it reversed the parole revocation decision and remanded the matter for a new revocation hearing. Pet. App. 37a.

3. The Board then petitioned the Supreme Court of Pennsylvania for allowance of appeal to address the Fourth Amendment issue, and the state supreme court granted the petition.[3] Between the state supreme court's granting of the petition and its decision from which certiorari now is sought, the Commonwealth Court issued a decision *en banc* which overruled its panel decision in this case. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n. 8 (Pa. Cmwlth. Ct. 1996) (en banc). The Board brought this intervening decision to the attention of the state supreme court and requested the court to remand this case to the Commonwealth Court. The state supreme court denied the request and proceeded to decide the appeal.

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[3]Under Pennsylvania law, the state supreme court's decision whether to accept an appeal from an intermediate appellate court, in a matter originally commenced in an administrative agency, is a discretionary decision. *See* 42 Pa. Cons. Stat. §724 .

The state supreme court affirmed the panel decision of the Commonwealth Court. Pet. App. 1a. The court held that Scott "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision" when he was paroled. Pet. App. 10a. The court then went on to consider whether the exclusionary rule should apply to bar introduction of the evidence obtained from Scott's residence. While recognizing that a majority of the United States Courts of Appeals have concluded that the exclusionary rule is inapplicable to parole revocation proceedings, *id.* at 12a - 13a, and that this Court has yet to address the issue, *id.* at 13a n. 8, the state supreme court nonetheless concluded that "there is a need to apply the exclusionary rule to the [parole] revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. Thus, notwithstanding Scott's written consent to searches by parole agents as a condition of his parole, and notwithstanding the settled differences between a criminal prosecution and an administrative parole revocation, the state supreme court concluded:

> In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's [*sic*] parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If a reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing. This holding modifies our *per se* bar against the application of the exclusionary rule in parole revocation hearings . . . and applies the exclusionary rule in revocation hearings when the officer who

engaged in the misconduct is aware of the parolee's status.

Pet. App. 16a-17a (footnotes omitted). The court then held that the exclusionary rule applied to Scott's parole revocation hearing and that the evidence obtained from the search of his residence should be suppressed.[4] Pet. App. 17a.

[4]The court specifically stated that its decision was "premised solely upon federal constitutional grounds," and it left "for another day" the question of the applicability of Pennsylvania's constitutional counterpart to the Fourth Amendment. Pet. App. 17a n.13.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS FROM OTHER STATES AND WITH DECISIONS FROM UNITED STATES COURTS OF APPEALS.

The Pennsylvania Supreme Court's decision places it squarely at odds with the Third Circuit Court of Appeals on the federal constitutional issue whether the exclusionary rule applies to parole revocation hearings. This reflects a conflict nationally among the federal courts of appeals and among the state courts as well.

As the decision of the state supreme court itself recognizes, its conclusion that the exclusionary rule should apply to the administrative function of parole revocation places it in conflict with a majority of the United States Courts of Appeals that have addressed the issue.[5] Pet. App. 12a.. It also places it in conflict with numerous decisions from other states.[6] By

[5]*See, e.g., United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984); *United States v. Finney*, 897 F.2d 1047 (10th Cir. 1990); *United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

[6]*See* cases collected at Pet. App. 35a.

contrast, the Courts of Appeals of two circuits, the Second and Fourth, have adopted a position similar to that of the Pennsylvania Supreme Court. *See United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978).

Nowhere is the conflict more acute than in the Third Circuit. In *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984), the Court of Appeals for the Third Circuit — the Circuit, of course, in which Pennsylvania is located — held *en banc* that the Fourth Amendment's exclusionary rule does not apply in probation revocation proceedings. The Third Circuit stated:

> [W]e are persuaded by the reasoning of those courts that have refused to apply the exclusionary rule in probation revocation proceedings. In our view, excluding from such proceedings reliable evidence bearing on a probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them.

712 F.2d at 831 (Opinion of Garth, J., adopted by majority of Court *per curiam*).

Thus, while the Court of Appeals for the circuit in which Pennsylvania is located has refused to apply the exclusionary

rule to revocation proceedings,[7] the Supreme Court of Pennsylvania has held the opposite.

The Court should review this case in order to resolve the conflict among the federal and state courts.

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[7]The decision in *Bazzano* concerned probation revocation proceedings, but the Court often has recognized the similarities between probation and parole in its analysis of constitutional requirements. *See, e.g., Black v. Romano*, 471 U.S. 606, 613 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 787-90 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489-90 (1972).

II. THE QUESTION WHETHER THE EXCLUSIONARY RULE SHOULD APPLY TO PAROLE REVOCATION DECISIONS IS AN IMPORTANT ONE THAT SHOULD BE ADDRESSED BY THE COURT.

While the state supreme court's decision in this case purported to recognize the important distinction between the constitutional rights of a criminal defendant and the limited rights of a parolee, its decision has obscured the distinction. By making the need for a search warrant depend on the knowledge of the parolee's status by the parole agent, the decision has ignored the purpose of the parole revocation proceeding and unnecessarily superimposed on the revocation process protections reserved for a criminal prosecution. Because the Court has not addressed this issue, and it is an important one, the Court should grant the petition for writ of certiorari.

Although the Fourth Amendment generally proscribes searches conducted outside the judicial process, the Court has recognized exceptions when "special needs, beyond the normal need for law enforcement," make the judicial cause requirement impracticable or unnecessary. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (search of probationer's home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of highly regulated business); *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (work-related search of employee's desk); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985) (search of student's property by school officials); *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (search of prisoner's cell); *Bell v. Wolfish*, 441 U.S. 520-558-60 (1979) (body cavity search of inmate).

Thus, as the Court often has stated, the exceptions to the Fourth Amendment's warrant requirement turn on whether a person has a "constitutionally protected reasonable expectation of privacy," *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), which calls for a two-part inquiry: whether the individual has manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

In the present situation, the state supreme court misapprehended both parts of the inquiry. The "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). In exchange for early release from prison into the community, a parolee such as Scott agrees to abide by certain conditions of parole, a violation of which permits society through its governmental representatives to reincarcerate the violator. There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his prison term. Scott in this case not only agreed to certain conditions of parole but he also gave his written consent to a warrantless search of his person, property and residence by agents from the Board. Pet. App. 1a-2a. These types of conditions are no different than conditions requiring drug and alcohol treatment, mental health treatment or other rehabilitative programming, all of which indicate diminished privacy expectations by a parolee over his conduct and his person. More importantly, they demonstrate that society is unwilling to release offenders before the expiration of their prison term unless certain conditions are met. *Morrissey*, 408 U.S. at 478-79.

Furthermore, as the Court has recognized, the government has an overwhelming interest in being able to return a parolee to imprisonment without the burden of a new adversarial criminal trial if the parolee has failed to abide by the conditions of parole. *Morrissey*, 408 U.S. at 480. Indeed, the Court repeatedly has stated that the decision to revoke probation or parole is an administrative one; it should be a flexible and informal process that "does not require the full panoply of procedural safeguards associated with a criminal trial." *Black v. Romano*, 471 U.S. at 613. *See also Gagnon*, 411 U.S. at 787-90; *Morrissey*, 408 U.S. at 489-90. By superimposing Fourth Amendment jurisprudence -- with the exclusionary rule and its exceptions -- onto what should be a purely administrative decision, the state supreme court has embarked down the path of converting what is an informal information-gathering proceeding into an adversarial trial. By holding that the exclusionary rule applies to what should be a "predictive and discretionary" process, the state supreme court has changed the role of the hearing body to one "more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." *Gagnon*, 411 U.S. at 787-88.

The Court's decisions do not support this departure. The Court thus should grant this petition to determine the important question whether the exclusionary rule should apply to parole revocation decisions.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari and, upon review, reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Keith M. SCOTT, Appellee,
v.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Appellant.

Supreme Court of Pennsylvania.

Submitted Sept. 16, 1996.

Decided July 3, 1997.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE and NIGRO, JJ.

OPINION

ZAPPALA, Justice.

This appeal presents the issue of whether a parolee who consents to warrantless searches as a condition of parole is entitled to invoke the protections of the Fourth Amendment in a parole revocation proceeding. For the following reasons, we affirm.

The record establishes that on April 2, 1982, Keith M. Scott, Appellee, was sentenced to a ten to twenty year term of imprisonment on his plea of nolo contendere to third degree murder. With an effective date of March 31, 1983, the Department of Corrections calculated the minimum expiration date on Appellee's sentence as March 31, 1993, and the maximum term expiration as March 31, 2003.

On September 1, 1993, Appellee was released on parole subject to enumerated conditions. Condition 5(b) provides that Appellee shall refrain from "owning or possessing any firearms or other

weapons." A further provision in the "Conditions Governing Parole/Reparole" states:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

R. 5a.

Upon his release from prison, Appellee resided at the home of his mother and stepfather, Patricia and John McDaniel. On February 4, 1994, while at a local diner with Dorothy Hahn, Appellee was arrested by three parole officers pursuant to a warrant issued by the Pennsylvania Board of Probation and Parole (Board) to commit and detain him for technical parole violations. The violations involved parole condition 5(b), with respect to possession of a .22 Magnum revolver on September 4, 1993, and the possession of a 10 millimeter Glock handgun sometime in September of 1993. The violations also concerned parole condition 5(c), which prohibits Appellee from engaging in "any assaultive behavior," and parole condition 7, which states, in part, that Appellee "must not consume alcohol under any condition for any reason."[1]

Before he was transported to the Monroe County Correctional Facility by Agent Dunham, Appellee gave his keys to Agent Mundro. Dorothy Hahn then drove Appellee's vehicle to his residence and Agents Mundro and Gallo followed. When they

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[1]These violations are not at issue in the instant appeal and are mentioned merely to set forth the factual predicate of the case.

arrived, no one was home. Agent Mundro then handed Hahn the key and instructed her to unlock the door. Upon entering the residence, Hahn telephoned Mrs. McDaniel, Appellee's mother. The agents awaited her arrival and, when she returned home, informed her that they were going to conduct a search of Appellee's bedroom. They neither requested nor received consent. Upon request of the agents, Mrs. McDaniel hesitantly directed the agents to the room.

After finding no evidence of a parole violation in Appellee's bedroom, the agents searched the adjacent room, which was used as a sitting room for Mrs. McDaniel. The room contained two small sofas, an ironing board and a television. Agent Mundro found five firearms under one of the sofas. One of the guns was in a zippered shotgun case, while the other four guns were wrapped in a white cloth and secured by electrical tape. The guns were not loaded and no ammunition was found. Agent Mundro also recovered a compound bow and three arrows in a closet in the room. Mrs. McDaniel explained that the firearms belonged to her husband and that Appellee was unaware of their presence.

On March 30, 1994, a parole violation hearing was held before an administrative law judge (ALJ). The ALJ admitted the evidence resulting from the search of the residence over defense counsel's objection.[2] Appellee argued that the agents' conduct

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[2]The charge on this violation stated:
1. Violation of Condition No. 5b: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS. (3 counts)

violated his right against unreasonable searches and seizures. When asked by the ALJ to explain the legal guidelines established for him to conduct the search, Agent Mundro responded:

> [A]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing [Appellee's] mother that we were going to search, and I asked her to please show us where his bedroom was. We also have the right to search any common living areas in the residence.

R. 62a.

Agent Mundro was also asked whether he had been advised by someone that shotguns and rifles were in the house. He stated:

> As speaking with [Agent] Gallo prior to making the arrest of [Appellee], he [Agent Gallo] indicated that there may be firearms in the home. I don't recall that we discussed specifically what types of firearms we might find, but we definitely did discuss the fact that there may be some in the home.

R. at 69a. Agent Mundro further stated that he did not recall the source of the information regarding the existence of the firearms. Id.

Appellee testified that he did not know the guns were in the home since his mother informed him that they had been removed. Mr. McDaniel testified that the guns belonged to him. He explained that he was aware that firearms were not permitted in Appellee's approved residence, and that he therefore removed the firearms from the gun closet and secured them under the couch in anticipation of giving them to his brother.

On June 6, 1994, the Board recommitted Appellee to serve 36 months backtime. It found that sufficient evidence supported all the violations concerning the possession of weapons and the consumption of alcohol. On September 6, 1994, the Board modified its previous decision by adding two aggravating reasons for its decision: (1) that Appellee had committed multiple violations and, (2) that he is considered a threat. Appellee sought administrative relief from the Board which was denied on November 8, 1994.

Appellee then appealed to the Commonwealth Court, contending inter alia, that the ALJ admitted evidence resulting from the search of the residence in violation of his Fourth Amendment rights. The Commonwealth Court reversed and remanded. Relying primarily on Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), the court concluded that a parole agent may not conduct a warrantless search of a parolee's residence in the absence of the consent of the owner or a statutory framework that satisfies the reasonableness requirement

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* * *

c. On 2-4-94, the following weapons were confiscated from your approved residence: one (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, no serial number; one (1) Harrington- Richardson 12 gauge single shotgun, serial number 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo-Colored Compound bow plus three arrows.

of the Fourth Amendment. It found that the consent provision in Appellee's parole agreement did "not comport with the dictates of Pickron." Commonwealth Court Opinion, 668 A.2d 590, 597 n. 3. Applying a balancing test, the court further held that the exclusionary rule was applicable to the instant parole revocation hearing because the deterrence of unlawful police conduct substantially outweighed the injury which would result from excluding the evidence obtained from Mundro's illegal search of Appellee's residence.[3] On May 15, 1996, we granted the Commonwealth's petition for allowance of appeal.

In an en banc opinion filed on July 1, 1996, the Commonwealth Court overruled its decision in this case "to the extent that it [held] that a balancing test applies and that evidence from the warrantless search should have been excluded from the parole revocation hearing." Kyte v. Pennsylvania Board of Probation and Parole, 680 A.2d 14, 18 n. 8 (Pa.Cmwlth.1996).[4] The en banc panel in Kyte found that it was well- established that the exclusionary rule was inapplicable to parole revocation hearings. It quoted extensively from our decision in Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973).

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[3]The court also reversed and remanded on the charges concerning the possession of a weapon on September 4, 1993 and the consumption of alcohol. It found that the admission of an affidavit was hearsay and constituted reversible error.

[4]Judge Kelley filed a concurring and dissenting opinion in which Judge Smith and Judge Friedman joined. Judge Kelly agreed that there was sufficient evidence to support the Board's finding of a parole violation, but disagreed as to the overruling of Scott since our Court had already granted allocatur in the matter at that time.

As noted, we granted allocatur to determine whether Appellee is entitled to the protections of the Fourth Amendment in his parole revocation hearing when he signed a consent to search provision as a condition of his parole.[5] We must first determine whether Appellee, as a parolee, has any protection under the Fourth Amendment. If we conclude that he does, we next examine the effect of his signing the consent to search provision in his "Conditions of Parole/Reparole." Finally, if we conclude that his right remains and was violated, we must determine whether, pursuant to the Fourth Amendment, the exclusionary rule applies to the administrative function of parole revocation.

Our recent decision in Commonwealth v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997), resolves our first two inquiries. In Williams, the defendant was paroled from prison and, as a condition of his release, signed a consent to search provision identical to the one signed by Appellee. Williams's parole agent subsequently received information from a reliable confidential informant that Williams had resumed his drug dealing activities. This information was confirmed by the local police. The parole agents then, without a warrant or the consent of the owner of the residence, searched Williams's bedroom and discovered 182.2 grams of cocaine, a pocket scale and ammunition. The parole officer contacted the local police, who seized the evidence and obtained an arrest warrant.

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[5]The Fourth Amendment to the United States Constitution states: [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Criminal charges were brought and Williams filed an omnibus motion to suppress the evidence seized from his bedroom on the ground that the search violated his constitutional rights. The trial court denied suppression. The Superior Court reversed and remanded, concluding that Williams's rights under the Fourth Amendment were violated.

In analyzing the suppression issue, we recognized that although parolees and probationers have a diminished expectation of privacy, "a probationer's home like anyone else's, is protected by the Fourth Amendment's requirement that searches be reasonable." Op. at ----, 692 A.2d at 1035, quoting Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987).[6] We explicitly held that a parolee has a privacy interest protected by the Fourth Amendment, although it is a

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[6]In Griffin, the Court held that a warrantless search of a probationer's residence was "reasonable" and did not violate the Fourth Amendment. The search was conducted pursuant to a state regulation which permitted warrantless searches of probationers if there are "reasonable grounds" to believe that contraband is present in their residence. The Court stated that the "special needs" of the state in supervising probationers justifies the departure from the usual probable cause requirements. The evidence recovered as a result of the search was therefore admitted in a subsequent criminal trial. While Griffin concerned a probationer's Fourth Amendment rights, the analysis employed equally applies to the constitutional rights of a parolee. See Gagnon v. Scarpelli, 411 U.S. 778, 782 n. 3, 93 S.Ct. 1756, 1759 n. 3, 36 L.Ed.2d 656 (1973); Cox v. Commonwealth, 507 Pa. 614, 493 A.2d 680 (1985).

more narrowly protected privacy interest than that afforded a free individual. Op. at ----, 692 A.2d at 1036.

We also relied on Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), where we held that the Fourth Amendment prohibited the warrantless search of a parolee's residence based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search.[7] Like Williams, Pickron involved the suppression of illegally obtained evidence in a criminal trial.

In deciding what effect the signing of the consent provision had on Williams's limited rights under the Fourth Amendment, we "balanc[ed] the governmental interests involved in granting parole and supervising parolees with that interest of the private individual, i.e., the parolee, which has been affected by the governmental action." Op. at ----, 692 A.2d at 1035, citing, Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

We concluded that,

> the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct

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[7]In 1995, the General Assembly enacted a legislative framework for searches conducted by state and county parole officers. See 61 P.S. §§331.27a and 331.27b. As the search in the instant case occurred in 1994, these provisions are not applicable.

reasonable searches of his residence listed on the parole agreement without a warrant.

Op. at ----, 692 A.2d at 1036.

We went on to say that a "search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty." Id. This "middle ground" approach requires reasonable suspicion to search a parolee's approved residence, rather than probable cause. We concluded that reasonable suspicion existed to support the search of Williams's bedroom since the information upon which it was based was given by a reliable confidential informant and was confirmed by the local police. Accordingly, we found that the evidence was admissible in the criminal proceeding.

Applying Williams to the instant case, we hold that Appellee has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision. We further find that this right was clearly violated since the search was conducted without reasonable suspicion. Agent Mundro testified that he spoke with Agent Gallo prior to the search and they concluded that there may be firearms in the home. Agent Mundro did not recall the source of the information regarding the existence of the weapons. Thus, the agents' suspicion was based on mere speculation and was insufficient to support a warrantless search of the room adjacent to Appellee's bedroom.

It does not necessarily follow, however, that exclusion of the evidence in the parole revocation proceeding is required. We recognize that the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized

evidence in all proceedings or against all persons." United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411, 82 L.Ed.2d 677, citing Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976). The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. Id. at 906, 104 S.Ct. at 3411. The remedy available in Williams, Pickron and Griffin, i.e., the application of the exclusionary rule, does not automatically apply to Appellee as parole revocation is an administrative proceeding.

In determining whether the exclusionary rule should be extended, we must balance the potential benefits of excluding the evidence against the potential injury to the historic role and function of the proceedings in which the illegally obtained evidence is to be admitted. If the potential harm substantially outweighs potential benefits, then the rule should not be extended. United States v. Calandra, 414 U.S. 338, 349, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974).

The Board, as Appellant, contends that this issue is controlled by our decision in Commonwealth v. Kates, which involved three consolidated probation violation cases. One probationer challenged the admissibility of a statement obtained absent Miranda warnings in violation of the Fifth Amendment. Another contended that he was precluded from confronting his accuser in contravention of the Sixth Amendment. The third probationer argued that it was improper to conduct a revocation proceeding prior to a criminal trial based upon the same conduct.

Balancing the good to be obtained from the expansion of the exclusionary rule against the harm which would result due to the unique nature and purpose of the probation revocation hearing, we concluded that the illegally obtained evidence was admissible in the probation violation hearing. Kates, 452 Pa. at 120, 305

A.2d at 710. Citing the United States Court of Appeals for the Second Circuit in Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-1164 (2nd Cir.1970), we stated that

> ... A Parole [sic] revocation proceeding is concerned not only with protecting society, but also, and most importantly with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes.
>
> There is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing. The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution.

Id. at 119, 305 A.2d at 710 (footnote omitted).

The decisions in Kates and Sperling focus on the sole purpose of the exclusionary rule under the United States Constitution which is to deter unlawful police conduct. United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The rationale is that applying the exclusionary rule to probation revocation hearings would at most marginally deter police misconduct and would frustrate the remedial purposes of the probation system.

A majority of the United States Courts of Appeals that have addressed the issue have agreed with this proposition and have found that the exclusionary rule is generally inapplicable to parole revocation hearings. See United States v. Finney, 897 F.2d 1047 (10th Cir.1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir.1983), cert denied, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984); United States v. Frederickson, 581 F.2d 711 (8th Cir.1978); United States v. Farmer, 512 F.2d 160 (6th

Cir.1975); United States v. Brown, 488 F.2d 94 (5th Cir.1973); United States v. Hill, 447 F.2d 8[illegible]7 (7th Cir.1971). Only the United States Court of Appeals f[illegible] the Fourth Circuit has held that the exclusionary rule is generally applicable to parole revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir.1978).[8]

Our research indicates, however, that two circuit courts of appeals, while adhering to the general rule that the exclusionary rule is inapplicable in parole revocation hearings, have adopted a limited application of the rule in instances where the law enforcement officers knew or had reason to know that the suspect was on probation. In United States v. Winsett, 518 F.2d 51, (9th Cir.1975), the Court of Appeals for the Ninth Circuit found that the interest in deterring police misconduct outweighs the interest in implementing the probation system when the officer is aware of the suspect's probationary status. The court reasoned,

> [W]hen the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards.

Id. at 54 n. 5.

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[8]To date, the United States Supreme Court has not spoken on this issue.

While reaffirming its decision in Sperling, upon which we relied in Kates, the Second Circuit Court of Appeals has accepted this view as well. United States v. Rea, 678 F.2d 382 (2nd Cir.1982). The court noted that the police officer in Sperling was unaware of the probationer's status and held that evidence seized by a probation officer in an illegal warrantless search of a probationer's home is inadmissible at a subsequent probation revocation hearing. The court stated:

> [A] probation officer who seeks to discover and seize evidence for use in a probation revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned.

Id. at 390.

We are persuaded by this approach which considers the knowledge of the officer engaging in the misconduct.[9] While the harm to the parole revocation proceeding from application of the exclusionary rule remains the same whether or not the officer is

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[9]We note that some of the federal courts which have precluded the use of the exclusionary rule in probation revocation proceedings have not been faced with the factual scenario where the officer who conducted the search knew or had reason to know that the suspect was a parolee or probationer. The court in Finney noted that it need not determine this specific issue since the facts did not support the officer's knowledge in that regard. 897 F.2d at 1048. The Bazzano court expressly left open the question whether the exclusionary rule should be applied in a probation revocation proceeding if the police knew or had reason to know that the target of their search was a probationer. 712 F.2d at 833 n. 1. (Garth, J., dissenting). Finally, in Hill, the court recognized the fact that the suspect was not known to the officers to be a probationer or parolee. 477 F.2d at 819 (Fairchild, J., dissenting).

aware of the parolee's status, the benefits obtained from expanding the rule are quite different.

Our focus is on the likelihood of deterring official misconduct. To illustrate the point, we first examine the instance when a police officer is unaware of the parolee's status. In that situation, the officer sees the parolee as any other citizen with full constitutional protection. The officer has no incentive to illegally obtain evidence as he is cognizant that such evidence will most likely be subject to suppression. Thus, the deterrent purpose of the exclusionary rule is adequately served by the application of the rule in the criminal trial. There is no reason to apply the rule in a parole revocation hearing because it is unlikely to act as an additional deterrent to illegal police behavior. In other words, because the police officer has no knowledge of a possible parole revocation hearing, the application of the exclusionary rule in that proceeding would not act to deter police misconduct in obtaining evidence to present there. When balancing the relevant interests, the scale tips in favor of the efficient operation of the revocation proceeding.

A different balance exists, however, when the officer knows or has reason to know that the suspect is a parolee or probationer. When the suspect's parole/probation officer or a police officer aware of the parolee's status engages in the misconduct, the balance is different. Under these circumstances, when there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained evidence in a proceeding which places a minimal burden of proof upon the

Commonwealth,[10] and the same result would be achieved as if the parolee was criminally tried--the parolee would be incarcerated. In this limited instance, the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings.

In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing.[11] This holding modifies our per se bar against the application of the exclusionary rule in parole revocation hearings set forth in Kates and applies the exclusionary rule in revocation

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[10]Our courts have consistently held that in parole and probation revocation proceedings the Commonwealth's burden is to prove a violation by a preponderance of the evidence. *Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985).

[11]We note that the recently enacted statute provides that "[a] property search may be conducted by any [parole] agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." 61 P.S. § 331.27a.(d)(2). The statute also provides that although no violation of the section can establish an independent ground for suppression of evidence in any probation/parole or criminal proceeding, the section should not be construed to permit searches in violation of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution. See 61 P.S. § 331.27a.(b)-(c).

hearings when the officer who engaged in the misconduct is aware of the parolee's status.[12]

Applying the rule to the instant case, we find that it is clear that Agents Mundro and Gallo knew Appellee was a parolee. This is established by the fact that immediately prior to the search, the agents arrested Appellee for parole violations. The exclusionary rule should therefore apply to Appellee's parole revocation hearing and the evidence obtained from the illegal search of his residence should be suppressed.[13] Accordingly, for the reasons

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[12]The outcome in Kates, however, would remain unchanged since there is no evidence that the police officers involved were aware of the probationary status of the suspects.

[13]Our decision is premised solely upon federal constitutional grounds. The history of our counterpart to the Fourth Amendment, Article I, Section 8 of the Pennsylvania Constitution, indicates that the purpose underlying the exclusionary rule in this Commonwealth is two- fold. We have held that "the exclusionary rule in Pennsylvania has consistently served to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause." Commonwealth v. Edmunds, 526 Pa. 374, 398, 586 A.2d 887, 889 (1991). Appellee, however, has not raised a claim under the Pennsylvania Constitution and therefore we leave for another day the question of the applicability of the exclusionary rule in an Article I, Section 8 challenge in a parole revocation proceeding. The statement in Commonwealth v. Williams that our state constitution does not grant greater rights with regards to warrantless searches by parole agents, Op. at ----, 692 A.2d at 1039, must be read in the context of that case, which involved a

set forth herein, the order of the Commonwealth Court is affirmed.

NEWMAN, J., did not participate in the consideration or decision of this case.

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criminal prosecution and not a parole revocation.

Keith M. SCOTT, Petitioner,
v.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Respondent.

Commonwealth Court of Pennsylvania.

Submitted on Briefs April 28, 1995.

Decided Nov. 30, 1995.

Before DOYLE and KELLEY, JJ., and NARICK, Senior Judge.

KELLEY, Judge.

Keith M. Scott appeals from an administrative order of the Pennsylvania Board of Probation and Parole denying his request for administrative relief from the board's revocation decision recommitting him as a technical parole violator. We reverse and remand..

On April 2, 1992, Scott was sentenced to a 10-to-20 year term of imprisonment on his nolo contendere plea to the crime of third degree murder. With an effective date of March 31, 1983, the Department of Corrections calculated the minimum expiration date on Scott's sentence as March 31, 1993, and the maximum term expiration date as March 31, 2003. On September 1, 1993, Scott was released on parole subject to a number of conditions.

On February 4, 1994, the board issued a warrant to commit and detain Scott, and a notice of charges and hearing based on his alleged technical violation of parole conditions 5b, 5c and 7. The notice alleged the following charges:

1. Violation of Condition No. 5b: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS. (3 counts)
a. On 9-4-93, you were in possession of a 22 Magnum revolver pistol.
b. During September of 1993, you were in possession of a 10 millimeter Glock handgun.
c. On 2-4-94, the following weapons were confiscated from your approved residence: one (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, no serial number; one (1) Harrington- Richardson 12 gauge single shotgun, serial no. 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo- Colored Compound bow plus three arrows.
2. Violation of Condition No. 5c: YOU SHALL REFRAIN FROM ANY ASSAULTIVE BEHAVIOR.
During November of 1993, you threatened a co-worker, Gerald Thomas, by approaching Mr. Thomas and stating "I am going to fuckin kill you" numerous times.
3. Violation of Condition No. 7, Special Condition: YOU MUST NOT CONSUME ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON. (2 counts)
a. On or about 9-2-93, you consumed Zima Clear Malt alcoholic beverages.
b. On or about 1-18-94, you consumed Southern Comfort alcoholic beverages.
(Certified Record (R.), pp. 10-11). On March 23, 1994, another notice of charges and hearing alleging the same technical parole violations was issued by the board. (R., pp. 24-25).

On March 30, 1994, a hearing was held on the alleged violations before John Engle, a hearing examiner. In support of Counts 1(a) and 3(a), the board called Eric Hahn as a witness. Because

Hahn was reluctant to testify at the hearing, the board introduced an affidavit signed by him to establish the alleged violations. Scott then made a statement, admitting the allegation contained in Count 1(a). Scott also introduced an affidavit executed by Hahn which indicated that his prior affidavit was executed under pressure by parole agents.

In support of Counts 1(b), 2 and 3(b), the board called Ray Opperlee. Opperlee testified and was cross-examined regarding these alleged violations of Scott's parole conditions. Scott denied the allegation in Count 3(b), stating that the only alcohol he had consumed while on parole was contained in prescription cough syrup. Scott did not comment on the other two counts.

In support of Count 1(c), the board called Larry Mundro, a parole supervisor. Mundro testified regarding a search that had been conducted on Scott's approved residence, his parents' house. Mundro found a number of weapons in the house. Scott argued that the search was executed in violation of his rights against unreasonable searches and seizures, and sought the exclusion of this evidence on these grounds. The hearing officer permitted Mundro to testify over Scott's objection.

In response, Scott stated that the weapons recovered from his parents' house were owned by his stepfather. Scott stated that, before his release, he had instructed his mother and stepfather that they must get rid of all of the guns in the house in order for him to stay there. Scott stated further that his mother had told him that she had taken all of his stepfather's guns from the house, and that he had no idea that the weapons were still there. In addition, the room in which the weapons were found was his mother's private sitting area. When he would come home at night, Scott stated, he would see his mother in there watching television.

At the hearing Scott's stepfather, John McDaniel, stated that the weapons recovered from the house were owned by him. Mr. McDaniel testified that after he was told that he would have to dispose of the weapons, he wrapped them up to give them to his brother. In addition, Mr. McDaniel indicated that the room in which the weapons were found was used exclusively by his wife to watch television.

Finally, in support of Count 3(a), the board called Parole Agent Loren Dunham to testify. Dunham stated that after he had arrested Scott on the parole violation charges, Scott admitted that he had consumed alcohol while on parole. Again, in defense of the charges, Scott stated that the only alcohol he had consumed while on parole, or that he admitted to consuming while on parole, was contained in prescription cough syrup.

On June 16, 1994, the board mailed Scott its decision regarding his parole violations. The board found that evidence had been presented to support the charges in Counts 1(a), 1(b), 1(c) and 3(a). In rendering this decision, the board relied on the following evidence: Scott's admissions regarding Counts 1(a) and (c); the testimony of Opperlee regarding Counts 1(b) and 2; the testimony of Mundro regarding Count 1(c); and the affidavit of Hahn regarding Counts 1(a) and 3(a). As a result, the board recommitted Scott to serve the remainder of his sentence and 36 months backtime. On September 6, 1994, the board modified its previous decision by adding two aggravating reasons for its decision; namely, that Scott had committed multiple violations and that he is considered a threat. Scott sought administrative relief from the board which was denied in a decision mailed on November 9, 1994. This appeal followed.

On appeal, Scott claims:[1] (1) the hearing examiner erred in allowing the introduction of evidence obtained in violation of his Fourth Amendment rights to support Count 1(c); (2) the hearing examiner erred in allowing the introduction of hearsay evidence to support Count 3(a) without a specific finding of good cause; (3) the violations found at Counts 1(c) and 3(a) are not supported by substantial evidence; (4) his recommitment to 36 months of backtime is not supported by substantial competent evidence and was done without adequate written justification; and (5) the notice of the hearing and charges for his preliminary and revocation hearings were improperly vague.

This court's scope of review of an adjudication by the board is limited to a determination of whether or not it is supported by substantial evidence, is in accordance with the law, and is observant of the petitioner's constitutional rights. Johnson v. Pennsylvania Board of Probation and Parole, 129 Pa.Cmwlth. 652, 566 A.2d 918 (1989), aff'd, 525 Pa. 573, 583 A.2d 790 (1991).

On appeal, Scott first claims that the warrantless non-consensual search of his parents' home violated his Fourth Amendment rights against unreasonable searches and seizures. At the parole revocation hearing, the board called Mundro as a witness to support the charges alleged at Count 1(c). (R., pp. 73- 86). Mundro was present when Scott was arrested for the alleged violations while he was at a diner with a companion. (R., pp. 76, 80). Prior to his arrest, Mundro was told that there might be firearms present in Scott's approved residence. (R., p. 85). As a result, after securing a key from Scott, Mundro and other

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[1]In the interest of clarity, we consolidate and reorder Scott's claims on appeal.

parole agents accompanied Scott's companion to his approved residence to search for firearms. (R., pp. 75-76, 78, 80).

Upon arriving at Scott's approved residence, Mundro gave Scott's companion the key and she unlocked the kitchen door. (R., p. 76). As soon as they entered the home, Scott's companion called his mother, Mrs. McDaniel, the owner of the home. Id. Mundro instructed all of the agents to remain in the kitchen while awaiting Mrs. McDaniel's arrival. Id. When she arrived, Mundro told Mrs. McDaniel that he was going to conduct a search of her son's bedroom and asked her to direct him to that room. (R., pp. 76-77). When Mrs. McDaniel hesitated to disclose this information, Mundro told her that he and the agents would go upstairs and locate and search his room themselves. (R., p. 77). Mrs. McDaniel acquiesced and escorted Mundro and the agents upstairs and pointed out her son's bedroom. Id.

After Mrs. McDaniel had gone back downstairs to the kitchen, Mundro searched a room adjacent to Scott's bedroom. (R., pp. 80, 81). The room contained two small sofas with an ironing board in between them, and a television set at the far end. (R., p. 80). Mundro found five firearms under one of the sofas in the room. (R., p. 81). One of the guns recovered was in a zippered shotgun case; the other four were wrapped in a white cloth with electrical tape securing the cloth. (R., pp. 81, 84). None of the guns were loaded, and Mundro did not find any ammunition. (R., pp. 83, 84). Mundro also found a compound bow and three arrows in a closet in the room. (R., pp. 81-82).

After uncovering the weapons, Mundro interviewed Mrs. McDaniel regarding their ownership. (R., pp. 82-83). He advised Mrs. McDaniel that he was confiscating the weapons because they were discovered in her son's approved residence and, in his opinion, they were accessible to Scott. (R., p. 83).

Mrs. McDaniel indicated that none of the guns belonged to her son and that they all belonged to her husband. Id.

Scott's counsel attempted to exclude Mundro's testimony, arguing that his search of the home was illegal as it was conducted without the consent of the homeowner. (R., pp. 73-74, 75, 77, 79). When asked by the hearing examiner to explain his legal responsibilities and the legal guidelines he follows in conducting a search, Mundro stated:

> [A]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing Mr. Scott's mother that we were going to search, and I asked her to please show us where his bedroom was. We also have the right to search any common living areas in the residence.

(R., p. 78).

In allowing the admission of the testimony, the hearing examiner stated:

> [T]he issue is on the record. My finding regarding this issue is that there were--that the consent--that the search (INAUDIBLE) was a bit unusual but within requirements so established for consent by residences of parolees by parole agents and the Commonwealth. So let's go forward having resolved the issue of the search.

(R., pp. 79-80).

The Fourth Amendment to the United States Constitution states, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searched and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...." U.S. Const. amend. IV.

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed. Id.

Although a search must usually be undertaken only pursuant to a warrant based upon probable cause, the United States Supreme Court has permitted exceptions when "special needs" beyond the normal need for law enforcement make the warrant and probable cause requirements impracticable. Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). In Griffin, a probationer's house was searched by probation officers acting without a warrant, on information from a police tip. The search was conducted under state regulations which allowed any probation officer to search a probationer's home without a warrant as long as his supervisor approved, and there were "reasonable grounds" to believe that contraband was present. The officers found a handgun which later served as the basis for a prosecution for a weapons offense. The probationer sought suppression of the handgun, alleging that it was obtained in violation of his Fourth Amendment rights. His suppression motion was denied and he was convicted of the weapons charge. His conviction was subsequently affirmed by the state appellate courts. Griffin, 483 U.S. at 870-72, 107 S.Ct. at 3167-68.

The United States Supreme Court granted certiorari to consider whether the search violated the probationer's Fourth Amendment rights. Id. at 870, 107 S.Ct. at 3166. The Court noted that a probationer does not enjoy the absolute liberty to which every citizen is entitled, but only a conditional liberty dependent upon the observance of probation restrictions. Id. at 874, 107 S.Ct. at 3169. However, a probationer's home, like anyone else's, is

protected by the Fourth Amendment's requirement that searches be "reasonable". Id. at 873, 107 S.Ct. at 3168.

The Court reasoned that a state's operation of a probation system, like its operation of a school, government office or prison, presents "special needs" beyond normal law enforcement which justifies departure from the usual warrant and probable cause requirements of the Fourth Amendment. Id. at 873-74, 107 S.Ct. at 3168. The "special needs" of the probation system made the warrant requirement impracticable, and justified the replacement of the probable cause standard with the "reasonable grounds" standard as contained in the state regulations. Id. at 875-76, 107 S.Ct. at 3169-70. Thus, the search of the probationer's home in Griffin satisfied the Fourth Amendment because it was carried out under a regulation which itself satisfied the Fourth Amendment's "reasonableness" requirement. Id. at 873, 107 S.Ct. at 3168.

In Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), the Pennsylvania Supreme Court acknowledged that parolees have limited Fourth and Fifth Amendment rights in parole revocation hearings.[2] In Pickron, parole agents went to the parolee's residence with a warrant for her arrest based on her failure to report. When they arrived, the agents advised her mother that they intended to search the house for her daughter, and they were admitted for that limited purpose. While searching a small office in the apartment, an agent found a bottle

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[2]Despite the minor differences between probation and parole, the revocation of probation where sentence has been previously imposed is constitutionally indistinguishable from the revocation of parole. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

of quinine, a cutting agent for heroin. An expanded search of the office, the parolee's bedroom and the kitchen yielded three packets containing a white substance, a packet containing a green weed, a plastic bottle containing another cutting agent, and a number of items used to package contraband. The parolee was arrested on her arrival at the apartment. Criminal charges were filed against her based on the items recovered in the search. Prior to trial, the parolee sought suppression of the items recovered from the apartment. The trial court granted the suppression motion; however, the Superior Court reversed the order granting suppression. Pickron, 535 Pa. at 243-44, 634 A.2d at 1094-95.

The Pennsylvania Supreme Court granted allocatur to examine the Fourth Amendment rights of a parolee. Id. at 245, 634 A.2d at 1095. Relying on Griffin, the court reversed the Superior Court order and reinstated the trial court order suppressing the items seized in the search. Id. at 247- 48, 634 A.2d at 1096-98. Our Supreme Court stated:

> In the instant case[,] we do not have before us a statutory or regulatory framework nor an agreement by the [parolee] consenting to the search. Thus, we are confronted with the issue left unaddressed by Griffin. We hold therefore that the fourth amendment prohibits the warrantless search of probationers or parolees' residences based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search. We do so because we recognize that there are no safeguards to protect the limited fourth amendments rights of probationers and parolees if their supervision is left entirely to the discretion of individual parole officers. In the traditional fourth amendment case, the warrant requirement based upon probable cause and issued by a neutral and detached magistrate guarantees the protection of a citizen's constitutional rights.

> Similarly, in the context of a probationer or parolee's limited fourth amendment rights, some systemic procedural safeguards must be in place to guarantee those limited fourth amendment rights. In the absence of any statutory or regulatory framework, or an agreement explicitly setting out the rights of the [parolee] and the authority of the state to supervise the [parolee], we are constrained to conclude that the actions of these parole officers violated the fourth amendment.

Id. at 249-50, 634 A.2d at 1098 (footnote omitted).

Thus, under Pickron, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of (1) the consent of the owner; or (2) a statutory or regulatory framework which satisfies the "reasonableness" requirement of the Fourth Amendment. Commonwealth v. Richardson, --- Pa.Superior Ct. ----, 664 A.2d 1042 (1995); Commonwealth v. Walter, 440 Pa.Superior Ct. 263, 655 A.2d 554 (1995); Commonwealth v. Alexander, 436 Pa.Superior Ct. 335, 647 A.2d 935 (1994).

In the instant case, it is clear that Mundro did not obtain the owner's valid consent to conduct a search of Scott's approved residence. In order for consent to an otherwise illegal search to be valid, the consent must be unequivocal, specific and voluntary. Commonwealth v. Gibson, 536 Pa. 123, 638 A.2d 203 (1994). To be effective, a consent to search must be voluntarily given with a total absence of duress or coercion, express or implied. Commonwealth v. Lowery, 305 Pa.Superior Ct. 66, 451 A.2d 245 (1982). It is only where there is an intentional relinquishment or abandonment of a known right or privilege that an effective waiver can be found. Gibson. The subject of a search must be made aware of her rights against a warrantless search for a waiver to be intelligent. Id.

Mundro gained entrance to Scott's approved residence by using a key recovered from him when he was arrested. (R., pp. 75-76). Once Mundro and the other agents were inside the kitchen, Mrs. McDaniel was contacted. (R., p. 76). When Mrs. McDaniel arrived, Mundro told her that he was going to search her son's bedroom and asked her to direct him to that room. (R., pp. 76-77). When she hesitated to disclose this information, Mundro told her that he and the other agents would go upstairs and locate and search the room themselves. (R., p. 77). Mrs. McDaniel acquiesced and directed Mundro to her son's bedroom; however, after she had gone back downstairs to the kitchen, Mundro found the weapons in his search of a room adjacent to her son's bedroom. (R., pp. 77, 80, 81). Under these circumstances, it is clear that Mrs. McDaniel did not voluntarily, intelligently and unequivocally consent to the search conducted by Mundro. Gibson; Lowery.

In addition, when asked by the hearing examiner the guidelines under which he may conduct a search, Mundro stated that "[a]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission...." (R., p. 78). Apparently, Mundro perceived that he had boundless authority to conduct a search of the residence. However, Mundro did not cite any statutory or regulatory framework granting him the authority to conduct such a search. Id.[3]

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[3]It should be noted that at the time he was paroled, Scott signed a Pennsylvania Board of Probation and Parole form PBPP-11 (Rev. 7/91) which is entitled "Conditions of Parole/Reparole" and states, in pertinent part:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

However, this consent paragraph does not comport with the dictates of Pickron. Richardson; Walter.

The "statutory or regulatory framework" referred to in Pickron requires the passage of a statute or regulation through the appropriate legislative process complete with publication in either the Pennsylvania Statutes or the Pennsylvania Bulletin. Richardson; Alexander. Our research has uncovered no enacted statute or regulation which would grant Mundro the authority to conduct such a search. Because Mundro's warrantless search of Scott's approved residence was conducted without the owner's consent and without a statutory or regulatory framework authorizing such a search, we must conclude that the search was conducted in violation of Scott's limited Fourth Amendment rights. Pickron; Richardson; Walter; Alexander.

Finding that the search violated Scott's Fourth Amendment rights, we must now address whether the evidence obtained in the search should have been excluded from the revocation hearing. The Fourth Amendment contains no provision precluding the use of evidence obtained in violation of its commands. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Rather, the exclusionary rule was adopted by the United States Supreme Court to effectuate the Fourth Amendment rights of citizens against unreasonable searches and seizures. Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); Calandra.

The purpose of the rule is not to redress the injury to the privacy of the victim of the search; its prime purpose is to deter future unlawful police conduct thereby effectuating the Fourth Amendment guarantees against unreasonable searches and seizures. Krull; Calandra. Thus, the rule operates as a judicially created remedy designed to generally safeguard Fourth Amendment rights through its deterrent effect, rather than to vindicate the personal constitutional rights of the aggrieved party. Krull; Leon; Calandra.

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to preclude the use of illegally obtained evidence in all proceedings or against all persons. Id. The issue of whether the exclusionary rule should be applied in a particular case is separate from the question of whether the Fourth Amendment rights of the aggrieved party were violated by police conduct. Leon. The application of the rule has been limited to those areas where its remedial objectives are thought to be most efficaciously served. Krull; Calandra. Therefore, in order to extend the rule beyond its traditional application in criminal prosecutions, the court must weigh the rule's potential for deterring unlawful actions against the damage of withholding reliable information from the truth-seeking process. Krull; Leon; Calandra. See also Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); Calandra.

To date, the United States Supreme Court has not addressed the issue of whether the exclusionary rule is applicable to parole revocation proceedings. However, the Court has used the balancing of interests framework first enunciated in Calandra to determine whether the rule should be applied beyond its traditional application. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (deportation

proceedings); Janis (a taxpayer refund suit); Calandra (grand jury proceedings). Therefore, we must apply the Calandra analytical framework to determine whether it is appropriate to extend the application of the exclusionary rule to parole revocation proceedings.

In general, the essence of parole is release from prison before the completion of the sentence, on the condition that the parolee abide by certain rules during the balance of the sentence. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Its purpose is to help individuals reintegrate into society as constructive individuals. Gagnon; Morrissey. Thus, it is primarily concerned with the rehabilitation and restoration of the parolee to a useful life. Commonwealth v. Marchesano, 519 Pa. 1, 544 A.2d 1333 (1988); Commonwealth v. Quinlan, 488 Pa. 255, 412 A.2d 494 (1980); Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973). It is a discretionary penological measure to which a parolee has no absolute right. Marchesano; Kates.

The granting and rescinding of parole are purely administrative functions. Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 501 A.2d 1110 (1985). Because the revocation of parole is not part of a criminal prosecution, the full panoply of rights due to a criminal defendant does not apply to parole revocations. Morrissey. The state has an overwhelming interest in being able to return a parolee to imprisonment without the burden of a new adversary criminal trial if, in fact, the parolee has failed to abide by the conditions of his parole. Id. Thus, the hearing determining the revocation of parole should be flexible enough to consider evidence and materials that would not be admissible in an adversary criminal trial. Id.; Kates. The controlling consideration at a revocation hearing is whether the facts presented are probative and reliable, and not whether

traditional rules of procedure have been strictly observed. Marchesano; Quinlan; Kates. As a result, the courts in Pennsylvania have generally declined to extend the exclusionary rule to parole revocation proceedings. Id.; Knuckles v. Pennsylvania Board of Probation and Parole, 111 Pa.Cmwlth. 487, 533 A.2d 1156 (1987); Nickens v. Pennsylvania Board of Probation and Parole, 93 Pa.Cmwlth. 313, 502 A.2d 277 (1985).

Pennsylvania is not alone in this regard. The majority of the federal courts that have addressed the application of the exclusionary rule to parole or probation revocation hearings have also concluded that, as a general rule, the rule is not applicable to these proceedings. See, e.g., United States v. Finney, 897 F.2d 1047 (10th Cir.1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir.1983); United States v. Frederickson, 581 F.2d 711 (8th Cir.1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir.1975); United States v. Winsett, 518 F.2d 51 (9th Cir.1975); United States v. Farmer, 512 F.2d 160 (6th Cir.1975); United States v. Brown, 488 F.2d 94 (5th Cir.1973); United States v. Hill, 447 F.2d 817 (7th Cir.1971); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2nd Cir.1970).

Only the United States Court of Appeals for the Fourth Circuit has held that the exclusionary rule is generally applicable to revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir.1978). See also United States v. Rea, 678 F.2d 382 (2nd Cir.1982) (Evidence seized by a probation officer in a warrantless search of a probationer's home is inadmissible at a subsequent probation revocation hearing as the deterrent effect of the exclusionary rule substantially outweighs the injury to the function of the proceedings).

In addition, a number of state courts have also declined to apply the exclusionary rule to revocation proceedings as a general rule.

See, e.g., Ex parte Caffie, 516 So.2d 831 (Ala.1987); State v. Sears, 553 P.2d 907 (Alaska 1976); State v. Shirley, 117 Ariz. 105, 570 P.2d 1278 (1977); Harris v. State, 270 Ark. 634, 606 S.W.2d 93 (App.1980); In re Tyrell J., 8 Cal.4th 68, 876 P.2d 519, 32 Cal.Rptr.2d 33 (1994); People v. Ressin, 620 P.2d 717 (Colo.1980); Payne v. Robinson, 207 Conn. 565, 541 A.2d 504 (1988); Thompson v. United States, 444 A.2d 972 (D.C.1982); People v. Watson, 69 Ill.App.3d 497, 26 Ill.Dec. 19, 387 N.E.2d 849 (1979); Dulin v. State, 169 Ind.App. 211, 346 N.E.2d 746 (1976); Kain v. State, 378 N.W.2d 900 (Iowa 1985); State v. Turner, 19 Kan.App.2d 535, 873 P.2d 208 (1994); State v. Davis, 375 So.2d 69 (La.1979); State v. Caron, 334 A.2d 495 (Me.1975); Chase v. State, 309 Md. 224, 522 A.2d 1348 (1987); Commonwealth v. Olsen, 405 Mass. 491, 541 N.E.2d 1003 (1989); People v. Perry, 201 Mich.App. 347, 505 N.W.2d 909 (1993); State v. Thorsness, 165 Mont. 321, 528 P.2d 692 (1974); State v. Field, 132 N.H. 760, 571 A.2d 1276 (1990); People v. Jackson, 46 N.Y.2d 171, 412 N.Y.S.2d 884, 385 N.E.2d 621 (1978); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982); Richardson v. State, 841 P.2d 603 (Okla.Crim.1992); State v. Spratt, 120 R.I. 192, 386 A.2d 1094 (1978); Hughes v. Gwinn, 170 W.Va. 87, 290 S.E.2d 5 (1982); Gronski v. State, 700 P.2d 777 (Wyo.1985).

Only a handful of state courts have found that, under their state constitutions, the exclusionary rule is generally applicable to revocation proceedings. See, e.g., State v. Cross, 487 So.2d 1056 (Fla.1986); State ex rel. Juvenile Department of Multnomah County v. Rogers, 314 Or. 114, 836 P.2d 127 (1992); Mason v. State, 838 S.W.2d 657 (Tex.App.1992); State v. Lampman, 45 Wash.App. 228, 724 P.2d 1092 (1986).

However, some of the federal courts that have declined to generally apply the exclusionary rule to revocation proceedings

obtained from Mundro's illegal search of Scott's approved residence. At the time Mundro went to the house, Scott had already been arrested for alleged parole violations. Mundro's sole purpose for conducting the search was to uncover evidence of additional violations. To recover this evidence, Mundro gained entrance to the house without Mrs. McDaniel's knowledge or consent. Once Mrs. McDaniel had arrived, she reluctantly directed Mundro and the other agents upstairs to Scott's bedroom. After she had gone back downstairs, Mundro expanded his search to another room adjacent to Scott's bedroom.

Under these circumstances, the application of the exclusionary rule is necessary and proper to proscribe a search such as the one conducted by Mundro in this case. In a case such as this, the need to exclude the improperly obtained evidence outweighs the injury to the parole revocation process which would be caused by the exclusion. See, e.g., Workman; Rea; Shirley; Turner; Kain; Davis; Sears.

As a result, the hearing officer should have excluded the evidence obtained in the illegal search at Scott's parole revocation hearing. Because this evidence was improperly admitted over Scott's objection, we must reverse and remand this case for a new revocation hearing. See Wagner v. Pennsylvania Board of Probation and Parole, 92 Pa.Cmwlth. 132, 498 A.2d 1007 (1985) (remand for a new hearing appropriate where hearsay evidence improperly admitted over parolee's objection); Grello v. Pennsylvania Board of Probation and Parole, 83 Pa.Cmwlth. 252, 477 A.2d 45 (1984) (same).

Scott next claims that the hearing officer erred in admitting Hahn's affidavit into evidence because it was hearsay evidence. In support of Counts 1(a) and 3(a) of the charges, the board

called Eric Hahn as a witness. (R., pp. 33- 52). However, at the hearing Hahn indicated that he was reluctant to testify. (R., pp. 33, 36-40). As a result, the board introduced an affidavit signed by Hahn to establish the alleged violations over Scott's objection. (R., pp. 40, 47). Hahn was questioned regarding the execution of the affidavit; however, he was not questioned on the substantive allegations contained therein. (R., pp. 34-35, 38-39, 40-47).

Scott then introduced another affidavit executed by Hahn which indicated that his prior affidavit was executed under pressure by parole agents. (R., pp. 47- 52). He also admitted the allegation contained in Count 1(a). (R., pp. 52- 55).[4]

In revocation hearings, documentary evidence and reports, including affidavits, may be used if the hearing examiner is satisfied as to their authenticity, relevancy, accuracy and reliability. 37 Pa.Code § 71.5(b). However, the introduction of hearsay evidence at a revocation hearing over counsel's objection where the hearing examiner fails to make a finding of good cause for admitting such evidence, constitutes reversible error. Wagner; Grello.

In this case, the hearing examiner admitted Hahn's affidavit over counsel's objection without making the requisite finding of good cause. As this was the only evidence introduced to show that

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[4]Scott notes that the affidavit was introduced by the board to show that he had committed Counts 1(a) and 3(a). However, because he admitted that he had committed Count 1(a), he was prejudiced by its admission only as it relates to proving that he committed Count 3(a).

Scott committed Count 3(a), we must reverse and remand for a new hearing on this claim as well. Wagner; Grello.

Based on our disposition of Scott's first two claims, we will not address the other claims raised on appeal. Accordingly, the order of the board is reversed and the case is remanded for a new hearing.

ORDER

NOW, this 30th day of November, 1995, the decision of the Pennsylvania Board of Probation and Parole, mailed November 9, 1994, at Parole No. 4488-X, is reversed, and this matter is remanded for proceedings consistent with this opinion.

Jurisdiction relinquished.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

No. 97-581

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

VS.

KEITH M. SCOTT,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent asks leave to file the attached Brief in Opposition without payment of costs and to proceed in forma pauperis.

The Respondent is now represented by the Public Defender's Office of Luzerne County, Pennsylvania, which has approved his application for representation based on his economic status.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Dated: 10/30/97

BASIL G. RUSSIN, ESQ.
Chief Public Defender

WILLIAM RUZZO, ESQ.
Assistant Public Defender

Office of the Public Defender
Luzerne County Court House
Wilkes-Barre, PA 18711
(717) 825-1766

18 p

PENNA. BOARD OF PROBATION AND PAROLE :

Petitioner : No. 97-581

vs. :

KEITH SCOTT : _____ **Term, 19__**

Respondent :

AFFIDAVIT

I, Keith Scott **being first duly sworn, depose and say that I am** Respondent **in the above entitled case; that in support of my motion for leave to proceed on petition for writ of certiorari in forma pauperis without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress.**

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

.51 cents an hour
SCI DALLAS

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self employment or in the form of rent payments, interest, dividends or other income? NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

I UNDERSTAND THAT FALSE STATEMENTS OR ANSWERS TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Dated this 2nd **day of** Oct. **, 1997**

Keith Scott

KEITH SCOTT, Respondent

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

I UNDERSTAND THAT FALSE STATEMENTS OR ANSWERS TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Dated this 24th day of Oct., 1997

Keith Scott

KEITH SCOTT, Respondent

No. 97-581

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,

Petitioner

VS.

KEITH M. SCOTT,

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

By: BASIL G. RUSSIN, ESQ.
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Counsel of Record for Respondent

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QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to a parole revocation hearing when the questioned evidence is seized without reasonable suspicion by an agent who knows of the parolee's status?

2. Whether a parolee is protected by the Fourth Amendment from an unreasonable search when he is required to sign a consent to search as a condition of parole?

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STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the Supreme Court of Pennsylvania on July 3, 1997. Petition for Writ of Certiorari was filed within ninety days. The Court has jurisdiction to review the decision by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..... " U.S. Const. Amend. IV.

COUNTER-STATEMENT OF THE CASE

The issue in this case is not whether the exclusionary rule should apply as a general rule to all parole revocation hearings. Rather, it is whether the exclusionary rule should be applied to a parole revocation hearing when the agents seizing the protested evidence know or have reason to know of the parolee's status. Under these circumstances, the basis for application of the exclusionary rule is the deterrent of unlawful conduct by government agents.

The Supreme Court of Pennsylvania has held that in our case the offending agent searched Respondent Scott's residence without reasonable suspicion and with full, actual knowledge of Scott's parole status. It reasoned further that application of the exclusionary rule under these circumstances is a deterrent to unlawful government conduct.

The procedural history and the facts from which this case arose are set forth in accurate detail by the Supreme Court of Pennsylvania in its Opinion. (Pet. App. 1a-6a). Scott was taken into custody at a local diner by parole agents while he was on parole after release from a state sentence. One of the agents, Agent Mundro, then conducted a search of Scott's bedroom and found no evidence of parole violations. (Pet. App. 3a). He then searched adjacent rooms and found and seized weapons which were enclosed in cloth and bound with tape in the sitting room of Mrs. McDaniel, Scott's mother, in whose home Scott was residing.

Partly as a result of the seized weapons, the Pennsylvania Board of Probation and Parole conducted a revocation and introduced, overs Scott's objection, the weapons in question. (Pet. App. 3a-4a). Scott sought and received review in the Commonwealth

Court of Pennsylvania which held that the Board had violated Scott's right to be free from unreasonable searches. (Pet. App. 31a). Moreover, it held that the exclusionary rule must apply to Scott's revocation hearing. (Pet. App. 37a).

The Board requested allowance of appeal from the Supreme Court of Pennsylvania, and that Court granted the request. In its affirmance of the Commonwealth Court, the Pennsylvania Supreme Court set forth its reasoned basis for applying the exclusionary rule in the specific context of Scott's parole revocation hearing. The Board then filed a Petition for Writ of Certiorari with this Honorable Court. Respondent Scott, through counsel, the Public Defender's Office of Luzerne County, Pennsylvania, files this brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Neither the Decision Below Nor the Record Raises the Question of "Whether the Exclusionary Rule Applies to Parole Revocation Proceedings."

Petitioner presents as No. 1 of its Questions Presented "Whether the exclusionary rule applies to parole revocation proceedings.?" (Pet. I). Respondent suggests that the Pennsylvania Supreme Court has not ruled nor has Scott contended that the exclusionary rule must be applied to all parole proceedings or all revocation hearings. The Pennsylvania Supreme Court has held in our case only that a search based on mere conjecture by agents with actual knowledge of Respondent's parole status should be suppressed so that unlawful governmental conduct might be deterred.

Petitioner claims that the Pennsylvania Supreme Court recognizes its conclusion that the exclusionary rule should apply to the administrative function of parole revocation places it in conflict with a majority of U.S. Courts of Appeal that have addressed the issue. (Pet. 9). A close reading of the Pennsylvania Supreme Court Opinion will show that this claim is misleading. The Pennsylvania Supreme Court has reasoned that while a majority of the U.S. Courts of Appeal have agreed that the exclusionary rule is generally inapplicable to parole revocation hearings, two circuit courts have adopted a limited application of the exclusionary rule where the enforcement officers knew or had reason to know that the suspect was on probation. (Pet. App. 12a).

Additionally, Petitioner's reliance on U.S. v. Brazzano, 712 F.2d 826 (3d Cir. 1983), cert . denied sub nom Mollica v. U.S., 465 U.S. 1078 (1984) is misplaced. (Pet. 10). The Brazzano Court held that "in the absence of evidence that the offending agents knew that

the target of their search was a probationer, the deterrent effect of excluding evidence would be substantially attenuated." Id. At 826. That court reasoned further and pointedly that it did not reach the question of whether the exclusionary rule would apply if the police knew or should have known that their target was on probation. Id. at 826, n. 1.

Contrastingly in the case at bar, the agents knew of Scott's parole status and conducted an unreasonable search despite that knowledge. (Pet. App. 17a). The Pennsylvania Supreme Court, instantly, based its analysis on facts easily distinguishable from those in Brazzano where agents who seized evidence were of a different sovereign from that which sought to introduce evidence at a probation hearing in the U.S. District Court.

In addition to Brazzano, Petitioner cites to seven cases which, it contends, support the propositions that the exclusionary rule does not apply to parole/probation revocation proceedings and that the Pennsylvania Supreme Court decision here is in conflict with a majority of the U.S. Courts of Appeal. (Pet. 9, n. 5). This contention is faulty; the facts of the cited cases are distinguishable from those of the instant case. Not one of the cases cited by Petitioner in n.5 arose from a situation wherein officers seizing questioned evidence knew of the probation/parole status of the person from whom they seized evidence. In our case, the Pennsylvania Supreme Court distinguishes this case from those in which seizing officers do not know of a person's probation/parole status. That Court reasons that the distinction is crucial in that knowledge of the releasee's status is a necessary factor in effecting the policy of deterrence implicit in an application of the exclusionary rule.

An examination of cases cited by Petitioner in note 5 will reveal specific distinctions as set forth herein. In U.S. v. Finney, 887 F.2d 1048 (10th Cir. 1990), the Court reasoned that the state officers involved did not know of the probationer's status, thus it did not need to determine whether the exclusionary rule would apply if the officers knew of the probationer's status. Id. at 1048.

In U.S. v. Fredrickson, 581 F.2d 711 (8th Cir. 1978), state authorities without knowledge of the release status of their suspect searched for and seized gambling paraphernalia from a probationer. Later the federal probation officer relied on that evidence to move for revocation of probation. Here again the Court's Opinion reveals that the deterrent effect of the exclusionary rule would not apply since the seizing officers were not aware of the suspect's release status. Additionally, in Fredrickson, the Court held the complained-of search was not violative of the Federal Constitution or statutes.

Similarly, the remaining cases cited by Petitioner at Pet. 9, n. 5, all examine scenarios in which the agents seizing evidence were unaware of the probation/parole status of the suspects. See U.S. v. Vandermark, 522 F.2d 1019 (9th Cir. 1975) (Border search of a probationer where agents unaware of release status); U.S. v. Farmer, 512 F.2d 160 (6th Cir. 1975) (Parole revocation hearing convened only after F.B.I. agents searched probationer's premises for gambling paraphernalia); U.S. v. Brown, 488 F.2d 44 (9th Cir. 1973) (Police officers did not know object of their search was on probation); U.S. ex rel Sperling v. Fitzpatrick, 426 F.2d 1161 (2d. Cir. 1970) (Exclusionary rule was used as deterrent in state criminal proceedings thereby negating necessity for its deterrent effect in revocation proceedings).

Considering the foregoing analysis of the cited cases, Petitioner's initial Question Presented confronts this Honorable Court with answering a hypothetical question, "whether the exclusionary rule applies in general to all probation/parole revocation proceedings." Respondent suggests that by denying the Petition for Certiorari here, this Court will refrain from answering a question not before it.

II. This Court Has Held That a Parolee Has a Diminished But Still Valid Expectation of Privacy Under the Fourth Amendment.

Petitioner sets forth as its second Question Presented, "Whether a parolee has a reasonable expectation of privacy, entitled to Fourth Amendment protection, when he consents to a search of his residence as a condition of accepting parole?" Respondent suggests that this Court need not answer that question here since it has addressed and disposed of that issue in Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L.Ed. 2d 709 (1987).

The Griffin Court held that, "A probationer's home like anyone else's is protected by the Fourth Amendment's requirement that searches 'be reasonable'." Id. At 873, 107 S. Ct. at 3168, 97 L.Ed. 2d. at 717. That Court continued its Fourth Amendment analysis by reasoning that although the probationer there was not entitled to the full panoply of Fourth Amendment protections, Wisconsin was required to comply with the reasonableness standard of the Fourth Amendment.

Keeping in mind that Griffin requires that a search of a probationer's home must comport with Fourth Amendment, we turn to an analysis of whether a search under a

state's regulation of releasees [a probationer in Griffin] is reasonable. The Griffin Court deferred to the State Court determination of reasonableness under Wisconsin's regulatory scheme for probationers.

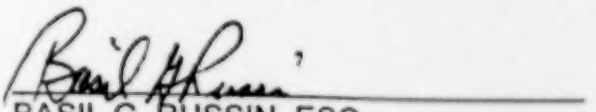
Similarly in our case, under the dictates of Griffin, we must turn to the Pennsylvania Supreme Court's analysis of the reasonableness of a search pursuant to Pennsylvania's regulatory scheme in governing its parolees. The Pennsylvania Supreme Court, in analyzing the effect of Respondent's signing a parole agreement, held that by signing the agreement he gave his parole officer the right to conduct only reasonable searches of his residence. Relying on that Court's reasoning in Comm. v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997), the Pennsylvania Supreme Court held that Pennsylvania's regulatory scheme for parolees allows for a diminished expectation of privacy, but still provides the parolee with protection from unreasonable searches.

Since under the two-part analysis of Griffin, a parolee has Fourth Amendment protection from unreasonable searches, and it is for the State Court to determine the reasonableness of a search under its state's regulatory scheme, Respondent respectfully requests that this Honorable Court need not grant review to answer Petitioner's second "Question Presented".

CONCLUSION

Based upon the foregoing law and argument, the Respondent, Keith M. Scott, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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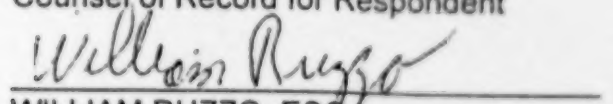

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